STATE OF MICHIGAN

COURT OF APPEALS

CARLEEN J. BASA, f/k/a CARLEEN J. GAUTZ,

Plaintiff-Appellee,

v

ANDREW J. BASA,

Defendant-Appellant.

UNPUBLISHED
August 4, 2009

No. 287311
Livingston Circuit Court
LC No. 05-037123-DM

Before: Meter, P.J., and Murray and Beckering, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I concur in the majority opinion's conclusion that the trial court's decision that an established custodial environment did not exist with defendant was against the great weight of the evidence. Despite the high standard of deference given to the trial court's findings of fact which is recognized by the great weight of the evidence standard, see *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994), there was significant evidence before the trial court tending to show that defendant was actively involved with the upbringing of the children after the parties' divorce. Indeed, the trial court initially found as a matter of fact, when it ruled from the bench after the initial evidentiary hearing, that the children had an established custodial environment with defendant and plaintiff. It was only in the subsequent written opinion and order that the trial court reversed itself, finding the custodial environment established only with plaintiff. Nonetheless, in that opinion and order the trial court did not articulate any basis for changing its opinion as to defendant, despite facts obviously appearing in the record to support the previous conclusion. Although a trial court certainly need not comment upon all the evidence presented, *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981), it was incumbent upon it to do so here because of its prior findings and conclusions, its abrupt reversal of its prior findings, and the evidence in the record.[1] In light of that evidence, as well as the trial court's prior conclusion that there was an established custodial environment with both parents, I concur

[1] The trial court indicated that its prior decision from the bench was erroneous based upon the evidence submitted at the "best interest" hearing, but did not indicate *what* evidence caused it to reverse its prior conclusions as to the custodial relationship *with defendant*. Instead, the court focused on the children's interaction with plaintiff and the financial situation of the parties.

in the reversal of the trial court's decision on the established custodial environment issue, and would remand for further findings.

However, I dissent from the majority's conclusion that the trial court's findings under two subsections of the change of domicile statute, MCL 722.31(4)(a)-(b), were against the great weight of the evidence. In my view, the trial court's conclusions under factors (a) and (b) were based on much more than the economic benefits of the move to Arkansas. Indeed, the trial court's detailed findings of fact under factor (a) include both the financial security that the move would provide to the children and the mother, as well as the presence of the mother's parents in Arkansas who, as the trial court noted, had "been a consistent presence in the children's lives as the children's care providers and as a support system for Mother." Additionally, the trial court made findings under factor (a) relative to the mother's work schedule in Arkansas, and how she would be with the children during the evenings and help with homework, that the children would all be attending the same school and ride the same bus on the same schedule, and that the area in which the mother and children would live was "safe" and "quiet" and "working class."[2] Thus, the trial court's findings under factor (a) were much more expansive than acknowledged by the majority opinion. Furthermore, there is nothing wrong with the trial court's emphasis (but not exclusive reliance) on the financial security provided by the mother's new position and surroundings in Arkansas. Indeed, many of the problems that arose in Michigan were directly related to the financial insecurity of both the father's employment positions and the inability of either parent to be financially secure without the assistance of the parents. The fact that there is more financial security available to the mother in Arkansas will be both an economic benefit to the children and, as the trial court noted, will provide a more stress-free life for the children during their childhood. In light of all of these findings, the trial court's findings under factor (a) were not against the great weight of the evidence.

The same holds true with respect to the trial court's findings under factor (b). The majority concludes that the trial court erred in applying factor (b), and that its findings were against the great weight of the evidence, because "the trial court's inquiry should have been limited to whether defendant exercised 'reasonable and liberal' parenting time as provided by the default judgment of divorce." The majority then concludes that the trial court's finding that defendant failed to exercise "consistent parenting time" was against the great weight of the evidence. I respectfully disagree. The evidence shows that defendant's exercise of his parenting time was, until at least the summer of 2006, sporadic. At certain times defendant's failure to exercise his parenting time was understandable, as it was necessitated by his work schedule. Nonetheless, it was still sporadic.[3] It is also undisputed that plaintiff was the primary caregiver

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[2] During the January 23, 2008 hearing, plaintiff testified to the location of the children's school, how and when they would get to school, when she would be with the children during the day, and that her parents would be at home when she was not. Plaintiff also testified to the characteristics of the neighborhood. Thus, evidence in the record supported these findings.

[3] Plaintiff testified that between the parties' separation in 2003 and divorce in 2006, defendant had no set parenting time schedule. Instead, he would visit the children, or the children would stay with him, as his time allowed. From the divorce in January 2006 until plaintiff left for Arkansas in August, 2007, defendant essentially exercised his parenting time every other

(continued…)

for the children until she relinquished their custody to defendant for purposes of relocating to Arkansas (which was precluded until the trial court held a hearing and decided the pending motion). And, although there was evidence that defendant exercised a good amount of parenting time, especially towards the time when plaintiff left for Arkansas, that some evidence existed that was contrary to the trial court's findings does not mean the trial court's findings are against the great weight of the evidence. See *Berger v Berger*, 277 Mich App 700, 707-708; 747 NW2d 336 (2007).

In light of the above, I would affirm the trial court's decision that the plaintiff had established by a preponderance of the evidence that a change in domicile was in the best interests of the children. MCL 722.31. I would vacate the trial court's decision on the established custodial environment, and remand for further findings on that issue. At that point, if the trial court again concludes that there was not an established custodial environment with defendant, the trial court should simply uphold its prior rulings. If, however, the trial court finds an established custodial environment with both parents, then it should consider the prior evidence (with any relevant updates)[4] to a clear and convincing evidence standard and determine whether clear and convincing evidence supports changing the children's custody.

/s/ Christopher M. Murray

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weekend, though from January to April 2006, defendant's work schedule precluded much visitation. Thus, the trial court's findings were supported by facts in the record.

[4] *Fletcher*, *supra* at 889.